JAN. 29, 1982
RECEIVED
FEB 1 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

81 6151

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES CUNNINGHAM, JR.,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

RANDY HERTZ
704 5th Street, S.E.
Washington, D.C. 20003

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
New York University School of Law
New York, New York 10012

ATTORNEYS FOR PETITIONER

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York
10019

(212) 586-8397

ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether the procedures for selecting the grand jury and traverse jury violated the Sixth or Fourteenth Amendments by discriminating on the basis of race or sex?

2. Whether the denial of State-paid investigative services violated the Sixth Amendment or the due process or equal protection clauses of the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Questions Presented	i
Citation to Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
How the Federal Questions Were Raised and Decided Below	6
Reasons for Granting the Writ	8
I. The Court Should Grant Certiorari To Consider Whether the Procedures For Selecting the Grand Jury or Traverse Jury Violated the Sixth or Fourteenth Amendments by Discriminating on the Basis of Race or Sex	8
II. The Court Should Grant Certiorari To Consider Whether the Denial of State-paid Investigative Services Violated the Sixth Amendment or the Due Process or Equal Protection Clauses of the Fourteenth Amendment	12
Conclusion	15
Appendix A	

TABLE OF CASES

	Page
Alexander v. Louisiana, 405 U.S. 625 (1972)	9
Carter v. Jury Commission, 396 U.S. 320 (1970)	10
Castaneda v. Partida, 430 U.S. 482 (1977)	8,10,12
Coleman v. Alabama, 377 U.S. 129 (1964)	8
Duren v. Missouri, 439 U.S. 357 (1979)	9
Eubanks v. Louisiana, 356 U.S. 584 (1958)	10
Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975)	9
Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045 (5h Cir.), cert. denied, 439 U.S. 1119 (1978)	13
Green v. County School Board, 391 U.S. 430 (1968)	11
Hernandez v. Texas, 349 U.S. 475 (1954)	10
Lee v. Habib, 137 U.S. App. D.C. 403, 424 F.2d 891 (D.C. Cir. 1970)	13
Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)	13
Moore v. United States, 432 F.2d 730 (3d Cir. 1979) (en banc)	12
Rose v. Mitchell, 443 U.S. 545 (1979)	8,9
State v. Second Judicial District, 85 Nev. 241, 453 P.2d 421 (1969)	13
Swann v. Adams, 385 U.S. 440 (1967)	11
Taylor v. Louisiana, 419 U.S. 522 (1975)	9
Turner v. Fouche, 396 U.S. 346 (1970)	10
United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963)	13
Other Authorities:	
ABA Standards Relating to the Defense Function, Commentary	12,13
Kairys, Kadane & Lehoczky, "Jury Representativeness: A Mandate for Multiple Source Lists," 65 Calif. L. Rev. 776 (1977)	9,10
J. Van Dyke, JURY SELECTION PROCEDURES (1977)	10

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

JAMES CUNNINGHAM, JR.

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner James Cunningham, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at __ Ga. __, 284 S.E.2d 390 (1981), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 13, 1981. A timely petition for rehearing was denied on December 1, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner James Cunningham, Jr., was convicted and sentenced to death in October, 1979, for murdering William Crawford in the course of an armed robbery.

The State's evidence at trial consisted primarily of petitioner's confessions to the police. In his first and second confessions, petitioner admitted that: on January 1, 1979, he and his wife went to the house of William Crawford, which contained Mr. Crawford's small store and residence (T. 226-27, 273); after conversing briefly with Mr. Crawford, petitioner struck him nine times with a pipe wrench until Mr. Crawford was unconscious (T. 226, 273-74); petitioner then went into Mr. Crawford's bedroom, and took a pocketbook containing $ 3330.00. In his third confession, petitioner informed police officers of the location of his blood-stained clothing, the pipe wrench, and Mr. Crawford's wallet, and led the police to these items. (T. 275-76.) In his final con-

fession, petitioner stated that he and his wife had planned the robbery together, and that it was his wife who took the money from the bedroom (T. 284-85).

The medical examiner testified that Mr. Crawford died of brain damage, inflicted by multiple blows to the head with a heavy metal object. (T. 150.) The State's other witnesses provided circumstantial evidence tending to link petitioner to the killing. Witnesses testified that petitioner and his wife were walking in the direction of Mr. Crawford's house shortly before the killing occurred (T. 176, 182). Acquaintances of the petitioner testified that he sought to borrow money shortly before the night of the killing (T. 171-72, 290-91), while other witnesses told of the petitioner's possessing a substantial amount of money after the time of the offense (T. 193, 198). Finally, witnesses testified that petitioner and his entire family left Georgia after the killing and went to New Jersey. (T. 189-90, 196-97, 200-01.)

During the sentencing hearing, the defense's presentation of mitigating evidence included testimony by petitioner's mother that he had never before been involved in any type of trouble (T. 380), and testimony by two former employers that petitioner had demonstrated trustworthiness during his employment (T. 374-75, 377, 383). The petitioner himself took the stand and told the jury that: he and his wife had not gone to the house with any plans to kill Mr. Crawford, and he had not intended to kill the deceased (T. 391-94); they had been driven to commit the robbery by their desperate need for money to prevent their losing their mortgaged trailer home (T. 387, 389); and he was drunk at the time of the killing, and was not fully aware of his actions (T. 388, 392).

Prior to the trial in this case, petitioner's counsel filed a "Motion to Quash Indictment Because Grand Jury

Unlawfully Composed" (R. 53), and a "Challenge to Array of Traverse Jury" (R. 60). Both pleadings challenged the local jury selection procedures as unconstitutionally discriminatory on the basis of race and sex. In a pretrial evidentiary hearing, petitioner presented the following statistics on the population of Lincoln County, Georgia, and the degree of under-representation of Black people and women on the grand jury and traverse jury:

(1) General population statistics for Lincoln County:

(a) Racial breakdown:
Black -- 46.12 %
White -- 53.79 %
(b) Composition by sex:
Women -- 50.86 %
Men -- 49.14 %

(T. 18, 32.)

(2) Statistics concerning Grand Jury representation:

(a) Proportionate representation:
Blacks -- 28.67 %
Whites -- 76.30 %
Women -- 34.27 %
Men -- 65.03 %

(b) Degree of under-representation:
Under-representation of Blacks -- 37.84 %
Under-representation of women -- 32.62 %

(T. 33-34.)

(3) Statistics concerning Traverse Jury representation:

(a) Proportionate representation:
Blacks -- 29.60 %
Whites -- 70.86 %
Women -- 34.03 %
Men -- 66.43 %

(b) Degree of under-representation:
Under-representation of Blacks -- 35.82 %
Under-representation of women -- 33.09 %

(T. 33-34.) In the evidentiary hearing, a jury commissioner for Lincoln County testified that in his opinion, there were sufficient qualified Black jurors and female jurors in the county to make up grand and traverse juries that were proportionately representative of these groups. T. 24-26. The

parties stipulated that three other jury commissioners would have expressed the same opinion if they had taken the stand. T. 29. In rebuttal to the petitioner's presentation, the State elicited testimony from a jury commissioner that jury selection was conducted in accordance with a 1973 federal court order requiring that the commissioners select every fifth name from the voter registration list for the traverse jury list, and select every third name from the voter list for the grand jury list. T. 27. After hearing the evidence, the trial court denied petitioner's claims, on the grounds that the jury commissioners' compliance with the federal court order established the lack of any discrimination, and that moreover, "this Court is at the present time without any power or authority to set aside the Federal court order." T. 36.

Prior to trial, petitioner's counsel sought court-ordered funding to retain an investigator. Counsel filed an Affidavit of Poverty (R. 23), and a "Motion for Funds to Hire An Investigator to Aid in the Preparation of Defendant's Defense," requesting $ 1,000 - $ 3,000 for investigative assistance. R. 35. In the motion, counsel stated that there were several witnesses who needed to be interviewed, including witnesses who were "located in widely disparate areas of the State and North Carolina." R. 36. Counsel further stated that petitioner lacked the finances to privately retain an investigator to interview these witnesses, and that counsel could not perform the task because he lacked the expertise and because he could not take time away from preparing the legal aspects of the case. Id. The trial court summarily denied petitioner's request. R. 46.

At the conclusion of the sentencing hearing, the court instructed the jury to determine whether to impose a sentence of life imprisonment or death on each of the two counts

charged - armed robbery and murder. T. 426-27. The judge then instructed the jury to determine the applicability of the following two aggravating circumstances:

> (1) The offense of murder and/or armed robbery and/or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, (2) The offense of murder and/or armed robbery and/or kidnapping was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim.

T. 428. The jury found that both of these aggravating circumstances were present (T. 432), and returned sentences of death on both the count of armed robbery and the count of murder. T. 432-33.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to trial, petitioner filed a "Motion to Quash Indictment Because Grand Jury Unlawfully Composed" (R. 53) and a "Challenge to Array of Traverse Jury" (R. 60). In each of these motions, petitioner argued that the local jury selection procedures discriminated on the basis of race and sex, in violation of the Sixth Amendment and the due process and equal protection clauses of the Fourteenth Amendment. R. 55, 62. After a pre-trial evidentiary hearing on these issues, the trial court denied the motions, ruling that the jury selection procedures could not be deemed discriminatory in that they complied with a 1973 federal court order establishing random selection procedures for the county. Id.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of these motions violated his Sixth and Fourteenth Amendment rights. Brief of Appellant, at 11-12. The Georgia Supreme Court rejected this claim, ruling that the petitioner's showing was insufficient to make out a prima facie case of discrimination in that petitioner had not shown that "the source was tainted" and that opportunity for discrimination existed from the source. Cunningham v.

State, ___ Ga. ___, 284 S.E.2d 390, 393. The state supreme court further denied the motion to quash the indictment on the procedural ground that the petitioner had not complied with the local requirement that such motions be filed prior to indictment. Id. at 392.

2. Petitioner filed a pre-trial "Motion for Funds to Hire an Investigator to Aid in the Preparation of Defendant's Defense." R. 35. In the motion, petitioner explained that the assistance of an investigator was required, because there were several witnesses who needed to be interviewed, including out-of-state witnesses. R. 36. Petitioner stated in the motion that he lacked the finances to privately retain an investigator (id.), and petitioner also filed a separate Affidavit of Poverty (R. 23). The trial court denied the motion in a summary order. R. 46.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of investigative assistance violated due process and equal protection. Brief of Appellant, at 30-31. The Georgia Supreme Court rejected this claim, holding that:

> the grant or denial of a motion for funds to employ an investigator lies within the sound discretion of the trial judge and will not be overturned unless an abuse of discretion is shown . . . . The case against the defendant was factually simple and did not depend on a large volume of evidence of a technical nature. We find no abuse of discretion in the trial court's denial of the motion for funds to hire an investigator.

Cunningham v. State, supra, 284 S.E.2d at 393.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES FOR SELECTING THE GRAND JURY OR TRAVERSE JURY VIOLATED THE SIXTH OR FOURTEENTH AMENDMENTS BY DISCRIMINATING ON THE BASIS OF RACE OR SEX

The substantial under-representation of Blacks and women in the grand jury and traverse jury violated the Sixth Amendment fair cross-section requirement and the Fourteenth Amendment guarantee of equal protection.[1/] Under this Court's well-established standards for assessing discrimination in jury selection,

> The first step is to establish that the [under-represented] group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or applied.... Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.... Finally, ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial under-representation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda v. Partida, 430 U.S. 482, 494 (1977); Rose v.

1/ In rejecting petitioner's challenge to the composition of the grand jury, the Supreme Court of Georgia both denied the claim on the merits, and invoked the procedural ground that the petitioner had failed to comply with a local rule requiring that such challenges to grand jury composition be filed prior to indictment. Cunningham v. State, supra, 284 S.E.2d at 392-93. However, despite the lower court's invocation of this procedural ground, this Court is still free to review the merits of the grand jury claim. When the state courts consider the merits of a claim despite the existence of a procedural bar, then this Court is similarly free to examine the substantive merits of the claim. Castaneda v. Partida, 430 U.S. 482, 485 n. 4 (1977); Coleman v. Alabama, 377 U.S. 129 (1964). In the present case, the trial court considered the grand jury composition claim on the merits (T. 35-36), and indeed permitted a full evidentiary hearing on the claim. The prosecuting attorney at trial did not in any way raise the procedural objection, and the trial judge did not invoke the procedural bar. Although the Georgia Supreme Court cited the procedural rule, it went on to consider the grand jury claim on the merits. See Cunningham v. State, supra, 284 S.E.2d at 392-93.

Mitchell, 443 U.S. 545, 565-66 (1979). The first criterion is clearly satisfied in the present case: "Negroes . . . are members of a distinct class capable of being singled out for different treatment under the laws" (Rose v. Mitchell, supra, 443 U.S. at 565), as are women (Duren v. Missouri, 439 U.S. 357, 363 (1979); Taylor v. Louisiana, 419 U.S. 522, 531 (1975)).

In applying the second criterion, the most commonly employed and reliable test of under-representation is the comparative disparity standard, which measures the percentage by which the probability of serving is reduced for members of the cognizable class. See, e.g., Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972); Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975); Kairys, Kadane & Lehoczky, "Jury Representativeness: A Mandate for Multiple Source Lists," 65 Calif. L. Rev. 776, 790-91, 7973-99 (1977). Under this test, the percentage of under-representation is analyzed with the following calculation:

$$\frac{\text{Proportion of the population that is in cognizable class} - \text{Proportion of source or pool that is in cognizable class}}{\text{Proportion of population in class}} \times 100$$

Incorporating the statistics developed at the trial level, one derives the following figures:

Grand Jury	Traverse Jury
(1) Under-representation of Blacks:	(1) Under-representation of Blacks:
$\frac{46.12 - 28.67}{46.12} \times 100 = 37.84\ \%$	$\frac{46.12 - 29.60}{46.12} \times 100 = 35.82\ \%$
(2) Under-representation of women:	(2) Under-representation of women:
$\frac{50.86 - 34.27}{50.86} \times 100 = 32.62\ \%$	$\frac{50.86 - 34.03}{50.86} \times 100 = 33.09\ \%$

In prior decisions, this Court has indicated that prima facie cases were established upon showing disparities of 23 % (Turner

v. Fouche, 396 U.S. 346 (1970), 33 % (Carter v. Jury Commission, 396 U.S. 320 (1970), 25 % and 33 % (Eubanks v. Louisiana, 356 U.S. 584 (1958)), and 14 % (Hernandez v. Texas, 349 U.S. 475 (1954)). Commentators have suggested, on the basis of caselaw and Civil Rights Commission standards, that any disparities exceeding 15 - 20 % require governmental rebuttal and justification. See J. Van Dyke, Jury Selection Procedures 98 (1977); Kairys, Kadane & Lehoczky, supra at 799 & n.24.

Accordingly, the under-representation statistics in this case were sufficient to establish a prima facie case of discrimination in violation of the Sixth and Fourteenth Amendments. In ruling that a prima facie case had not been shown, the Georgia Supreme Court stated that "[t]here was no evidence that the source was tainted in that there was no showing that an opportunity for discrimination existed from the source of the jury list." Cunningham v. State, supra at 393. But, as this Court has made clear, statistical disparity alone is sufficient to make out a prima facie case, and the challenger of the jury system is not required to show opportunity for discrimination in the source list. Castaneda v. Partida, supra, 430 U.S. at 494-95 ("a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing," but statistical showing is sufficient: "Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discrimination...").

Since a prima facie case of discriminatory jury selection had been established, the burden fell upon the State to rebut the prima facie case. In rebuttal, the State showed that the current selection procedures conform to a 1973 federal district court order establishing certain random selection criteria. The State maintained that since the federal court adopted this

procedure to attempt to ensure impartial jury selection, and since the currently employed procedures comply with the federal court order, the procedures therefore do not infringe upon the defendant's Sixth and Fourteenth Amendment rights. The flaw in this logic is readily apparent. Although the 1973 court order was intended to establish impartial jury selection processes in Lincoln County, the empirical evidence has now shown that the procedure does not satisfy that goal. Even a procedure which was originally designed to protect a constitutional right must be abandoned when it is demonstrated that the procedure violates the very constitutional right it was supposed to protect. Cf. Swann v. Adams, 385 U.S. 440 (1967) (invalidating apportionment plan constructed to effectuate the constitutional mandate of one-person-one-vote, because the apportionment plan produced unconstitutional inequalities); Green v. County School Board, 391 U.S. 430 (1968) (striking down local procedure for implementing Brown v. Board of Education because empirical evidence demonstrated that the procedure failed to produce the requisite goal of a nondiscriminatory school system).[2/]

2/ The trial court in this case rejected petitioner's challenge to the selection procedures in part because it concluded that it was "at the present time without any power or authority to set aside the Federal court order that pertains to this county on composition." T. 36. The Georgia Supreme Court did not rely on this principle of deference, apparently because, as the state supreme court's opinion recognizes, the federal court order expressly provided for a means by which the county jury comissioners could modify the selection procedures. Cunningham v. State, supra, 284 S.E.2d at 393. See Order, Twilight Improvement Ass'n v. Jury Com'n of Lincoln County, C.A. 1658 (S.D. Ga., January 8, 1973) (Alaimo, J.) ("Prior to any change in the procedures set forth in paragraph 2 of this order, the Jury Commissioners shall give notice of same to the Judge of the United States District Court for the Southern District of Georgia and to all counsel of record for plaintiff.") R. 58-59. In any event, even if the federal court decision had precluded action by the state courts, obviously this Court has the power to rectify the inequalities created by the selection procedures.

Thus, petitioner's prima facie case of discrimination was not rebutted, and the jury selection procedures accordingly must be struck down as violative of the Sixth and Fourteenth Amendments. Castaneda v. Partida, supra, 430 U.S. at 499. This Court should grant certiorari to ensure that capital convictions are not secured through unconstitutional jury selection procedures.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF STATE-PAID INVESTIGATIVE SERVICES VIOLATED THE SIXTH AMENDMENT OR THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Thorough and extensive factual investigation is critical to the presentation of an adequate defense at trial. It has been widely recognized that:

> [R]epresentation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance.

Moore v. United States, 432 F.2d 730, 739 (3rd Cir. 1979)(en banc). The American Bar Association's standards for defense counsel expressly recognize a "duty to investigate" because

> it is axiomatic among trial lawyers and judges that cases are not won in the courtroom but by the long hours of laborious investigation and careful preparation and study of legal points which precede the trial. In our system of justice a trial is not an inquiry to expose previously unknown facts. . . . Investigation and preparation are the keys to effective representation .... It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice.

ABA Standards Relating to the Defense Function, Commentary,

at 224-25; see id., Standard § 4.1 (Duty to Investigate).

Although this Court has not as yet ruled on the question of an indigent defendant's constitutional right to State-paid investigative assistance, several lower courts have concluded that indigent defendants are entitled to such services under the equal protection clause of the Fourteenth Amendment, or in order to satisfy the Fourteenth Amendment's requirement of fundamental fairness and the Sixth Amendment's requirement of effective assistance of counsel. See Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)(Sixth and Fourteenth Amendment right to effective assistance of counsel encompasses right to State-paid investigative services); Lee v. Habib, 137 U.S. App. D.C. 403, 411, 424 F.2d 891, 899 (1970)(Wright, J.)(equal protection); United States v. Germany, 32 F.R.D. 421, 423-24 (M.D. Ala. 1963)(Johnson, J.)(effective assistance of counsel); State v. Second Judicial District, 85 Nev. 241, 453 P.2d 421 (1969)(equal protection); cf. Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045, 1054-55 (5th Cir.), cert. denied, 439 U.S. 1119 (1978)(constitutional right to access to the courts confers entitlement to State-paid investigative services in habeas corpus proceedings).

In the present case, defense counsel sought investigative resources on behalf of his indigent client, in order to prepare for trial, and particularly, in order to interview witnesses, some of whom were "located in widely disparate areas of [the] State and North Carolina." Motion for Funds to Hire an Investigator, R. 35, 36. In rejecting petitioner's claim that he was constitutionally entitled to such assistance, the Georgia Supreme Court stated that the trial judge's denial of funding was not an abuse of discretion because: "The case against the defendant was factually simple and did not depend on a large

volume of evidence of a technical nature." Cunningham v. State, supra, 284 S.E.2d at 393. Although the transcript does indeed reflect a very brief and simple trial, the inadequacy of the defense's attack upon Government witnesses and the paucity of defense evidence may well have been due to the absence of adequate defense investigation of this case.

Indeed, the record reflects several ways in which proper investigation could have aided the defense. The State's case rested almost exclusively on the confessions of petitioner, and investigation would have greatly enhanced the defense's chances of suppressing these confessions. An investigator conceivably could have found guards or other prisoners from the North Carolina jail to support the defense's allegation that at the time of the first confession, petitioner was suffering from lack of sleep and was in such a poor physical and mental condition as to render the confession unconstitutionally involuntary. An investigator also might have been able to provide evidentiary support for defense counsel's allegations that the third confession was unconstitutionally coerced through police officers' deliberate misrepresentations, and that all of the confessions had been unconstitutionally obtained in violation of petitioner's Sixth Amendment right to the presence of already appointed counsel. Moreover, an investigator could have interviewed the various police officers involved in taking the confessions, and provided impeachment material to use in attempting to suppress the confessions on grounds of failure to comply with Miranda requirements.

Furthermore, investigative assistance could have substantially bolstered the defense's other legal challenges. For example, an investigator could have helped amass more substantial factual bases for the attack upon the discriminatory jury

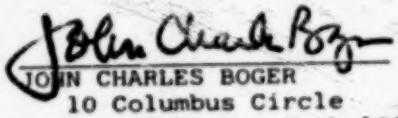
selection procedures (R. 53, 60), and for the request for change of venue on grounds of prejudicial pre-trial publicity (R. 16). An investigator also could have aided in preparing for the capital sentencing hearing, by seeking additional mitigating witnesses, and by supplying the statistical and factual bases for an argument on proportionality.

Accordingly, the record demonstrates several ways in which adequate investigative resources could have substantially improved the efficacy of defense counsel. This Court should grant certiorari to determine whether the trial court's denial of such resources deprived petitioner of equal protection and effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ATTORNEY OF RECORD

RANDY HERTZ
704 5th Street S.E.
Washington, D.C. 20003

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
New York University School of Law
New York, New York 10012

ATTORNEYS FOR PETITIONER

Dated: New York, New York
January 29, 1982

(D.Md.1979) . . ." *In re San Juan Star Co. v. Barcelo*, 662 F.2d 108 (1st Cir. 1981).

The court in *San Juan* realized what the majority in the instant case apparently does not—that the question of whether parties in a given case should be prevented from publishing information received in the course of discovery presents a complex issue and necessitates a balancing of competing interests.

The trial court's order provides: "a) That Defendant Georgia Gazette Publishing Company shall not reproduce, quote nor refer to any information obtained solely through discovery in this litigation for the purpose of any oral or written publication by or on behalf of any defendant . . . "h) Provided that, if any party wishes to publish or otherwise disseminate any information procured solely through discovery which is covered by the terms of this order, that party shall first notify the opposite party or parties to that effect in writing, setting out with particularity the specific information that party intends to disseminate. Within five days of the receipt of such notice, the opposite party may apply to this court for an order forbidding dissemination of the particular information so specified, the burden resting upon that party to show the continued necessity of such an order. The party opposing the dissemination shall submit with his application for such order a rule nisi order setting his motion for a hearing. Until such a request for an order forbidding dissemination is denied by the court, no information covered within the terms of this order shall be disseminated. If, however, the opposite party does not request an order within five days of receipt of the notice, dissemination of the information specified in the notice shall no longer be limited by this order."[1] Presumably, the trial court would undertake to balance the interests of the parties when appellants sought to publish information obtained solely through discovery.

Regrettably, the majority concludes that, regardless of the severity and certainty of the harm to occur upon publication of information obtained through discovery, a trial court is powerless to act because of the "plain language" of Code Ann. § 2-104.[2] I do not believe this conclusion is sound. Surely it is not consistent with prior decisions of this court or with existing federal authority. I respectfully dissent.

1. Paragraph "g" of the trial court's order states:

"Excepted from the provisions of this order are: (i) Use of discovered material for purposes of this litigation by parties and counsel. (ii) Use of discovered material for review by witnesses who may testify for any party provided that party has notified the opposite party at least ten days prior to the date of the intended dissemination that the person may be used as a witness. (iii) Use in compliance with any valid subpoena served upon any party."

2. It is interesting to note that, under the Civil Practice Act, a trial court is empowered to order that "discovery not be had" where it is necessary to protect a party from "annoyance, embarrassment, oppression, or undue burden." CPA § 26(c) (Code Ann. § 81A-126(c)). Under the majority opinion, however, once the trial court permits discovery, the power of the court to protect the rights of the individual is irrevocably lost.

CUNNINGHAM

v.

The STATE.

No. 37736.

Supreme Court of Georgia.

Nov. 13, 1981.

Rehearing Denied Dec. 1, 1981.

Defendant was convicted in the Superior Court, Lincoln County, Robert L. Stevens, J., of armed robbery and murder and sentenced to death, and he appealed. The Supreme Court, Jordan, C. J., held that: (1) evidence supported convictions; (2) trial

court did not abuse its discretion in denying defendant's motions for independent psychiatric evaluation or for funds for private investigator; (3) evidence supported jury's finding that aggravating circumstances justifying imposition of death sentence existed; and (4) even though death sentence for murder was not excessive or disproportionate, death sentence for armed robbery would be set aside.

Affirmed in part; reversed in part.

1. Grand Jury ⇐17
Jury ⇐117

In prosecution for armed robbery and murder, trial court did not err in overruling defendant's motion challenging grand and traverse jury array where there was no reason why challenge could not have been filed prior to defendant's indictment and where there was no evidence to show that jury commissioners were not in strict compliance with federal district court order for selection of jurors.

2. Homicide ⇐250
Robbery ⇐24.1(3)

In prosecution for murder and armed robbery, evidence that defendant went to victim's home with express intent of robbing him, that defendant concealed murder weapon on his person, that defendant hit victim in the head, robbed him, and left him to die, and that defendant was seen in general vicinity at approximate time of murder was sufficient to support conviction.

3. Criminal Law ⇐29

Where defendant was indicted and convicted for malice murder, not felony murder, simultaneous armed robbery conviction would be affirmed.

4. Criminal Law ⇐1147
Mental Health ⇐434

Grant or denial of motion for independent psychiatric evaluation lies within discretion of trial court and will not be overturned unless abuse of discretion is shown.

5. Costs ⇐302.3
Criminal Law ⇐1147

Grant or denial of motion for funds to employ investigator lies within sound discretion of trial judge and will not be overturned unless abuse of discretion is shown.

6. Costs ⇐302.3

In prosecution for murder and armed robbery, trial court did not abuse its discretion in denying defendant's motion for funds to hire investigator where case was factually simple and did not depend on large volume of evidence of technical nature.

7. Mental Health ⇐434

In prosecution for murder and armed robbery, trial court did not abuse its discretion in overruling defendant's motion for private psychiatric examination where defendant had been examined twice and found to be mentally competent both times and where defendant did not enter plea of insanity.

8. Criminal Law ⇐412.1(2)

Where, after being advised of his rights following his arrest, defendant requested that police officers see him and defendant gave statement to officers, statement was admissible at his trial.

9. Criminal Law ⇐1169.3

In prosecution for armed robbery and murder, defendant did not suffer material prejudice from introduction of his second statement where second statement was identical to first statement and first statement was properly introduced against him.

10. Criminal Law ⇐627.7(2)

In prosecution for armed robbery and murder, trial court did not err in denying defendant's *Brady* motion for copies of exculpatory statements given to investigating officers where statements which were subject of *Brady* motion were defendant's own statements and where evidence his motion sought was introduced to jury in its entirety.

11. Criminal Law ⇐665(2)

Orderly presentation of evidence is proper reason for exception to rule requiring sequestration of witnesses.

12. Criminal Law ⇐665(2)

In prosecution for murder and armed robbery, trial court did not abuse its discretion in allowing investigating officers to remain in courtroom to assist prosecution in presenting its case, despite defendant's objection.

13. Criminal Law ⇐126(2)

In prosecution for murder and armed robbery, trial court did not err by overruling defendant's motion for change of venue based on pretrial publicity where defendant was not tried until ten months after news reports were published and there was no evidence presented as to any juror prejudice toward defendant on voir dire or otherwise.

14. Homicide ⇐354

In prosecution for murder, evidence that victim was beaten and left to die by defendant, that defendant fled and attempted to hide crime, and that sole motive for crime was robbery supported finding of aggravating circumstances required for imposition of death penalty. Code, §§ 27-2534.1(b)(2, 7), 27-2537(c)(1-3).

15. Criminal Law ⇐1208(1)

Jury's returning aggravating circumstance required for imposition of death penalty in language of code section is sufficient when evidence supports such finding. Code, §§ 27-2534.1(b)(2, 7), 27-2537(c)(1-3).

16. Criminal Law ⇐824(2)

In prosecution for murder, trial court's error in failing to charge jury with definition of aggravated battery for purposes of finding aggravating circumstances justifying imposition of death sentence was not reversible absent request to charge where evidence supported finding beyond reasonable doubt that murder was committed during commission of aggravated battery. Code, §§ 26-1305, 27-2534.1(b)(2, 7).

17. Criminal Law ⇐1206(1)

Death penalty statute was not unconstitutional for failing to set out that jury may recommend life sentence even though they find existence of aggravating circumstance and for failure to provide for life sentence without parole. Code, §§ 26-1305, 27-2534.1(b)(2, 7).

18. Robbery ⇐30

Even though defendant's sentence to death for murder was not excessive or disproportionate, sentence to death for armed robbery would be set aside.

Samuel A. Fowler, Jr., Albert H. Dallas, Thomson, for James Cunningham, Jr.

Kenneth Goolsby, Dist. Atty., Dennis Sanders, Asst. Dist. Atty., Thomson, Arthur K. Bolton, Atty. Gen., for the State.

JORDAN, Chief Justice.

James Cunningham, Jr., was indicted for burglary, armed robbery and murder. The trial court dismissed the burglary count, and he was convicted of armed robbery and murder. The jury sentenced him to death on both counts. The case is here on direct appeal and for mandatory review of the death sentences.

[1] 1. Defendant contends the trial court erred in overruling his motion to quash the indictment and his challenge to the array of traverse jurors in that both the grand and traverse jury lists were unlawfully composed.

Counsel for defendant was appointed on January 8, 1979. Defendant was not indicted until January 22, 1979. The motion to quash the indictment was not filed until October 22, 1979, one day prior to trial. No reason appearing as to why the challenge to the grand jury could not have been filed prior to indictment, there is no merit in this enumeration. The trial court did not err by failing to quash the indictments. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. den. 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976); *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979), rev. on other

grounds, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Sullivan v. State*, 246 Ga. 426, 271 S.E.2d 823 (1980).

Furthermore, the jury commissioners of Lincoln County are presently under a continuing order of the United States District Court for the Southern District of Georgia to revise the grand and traverse jury lists by using the registered voters list in the general election and by randomly selecting every fifth name for the traverse jury and every third name on the traverse list for the grand jury. Furthermore, prior to any change in such procedures, notice must be given to the District Court.

The jury commissioner called to testify stated that the commissioners were in strict compliance with the district court order in compiling the traverse jury list. There was no evidence that the source was tainted in that there was no showing that an opportunity for discrimination existed from the source of the jury list. Given the neutral selection methods used by the jury commissioners the statistical disparity between the percentage of blacks residing in the county and the percentage on the jury lists affords no ground of relief. The trial court did not err in overruling defendant's challenge to the array. *Davis v. State*, 241 Ga. 376(1), 247 S.E.2d 45 (1978).

[2] 2. Defendant contends in enumerations of error 2, 3 and 4 that the trial court erred in overruling his motion for new trial on the general grounds.

In addition to defendant's confession, the evidence presented authorized the jury to find that the defendant, after unsuccessful attempts to borrow money, went to the victim's home with the express intent of robbing him, that he concealed the murder weapon on his person and when he had the victim at a disadvantage began to hit him in the head until he fell to the floor. He then robbed the victim, and left him to die. The murder weapon was recovered and introduced in evidence, as was the victim's wallet and defendant's blood stained clothes. Testimony placing the defendant in the general vicinity at the approximate time of the murder and testimony about bloody footprints at the scene identified as being made by defendant's shoes was introduced, as was testimony about his flight.

The evidence presented is sufficient to authorize the verdict under the current legal standard, and there is no merit in these enumerations of error. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and *Tucker v. State*, 244 Ga. 721(1), 261 S.E.2d 635 (1979).

[3] 3. Defendant contends in enumeration of error 6 that his conviction and sentence to death for armed robbery are error. He argues that the conviction must be set aside because the armed robbery is the felony supporting his felony murder conviction. Defendant was indicted for malice murder and the jury was instructed only as to malice murder. The jury returned a verdict of guilty of malice murder. *Barrow v. State*, 235 Ga. 635(2), 221 S.E.2d 416 (1975); *Dobbs v. State*, 236 Ga. 427, 433, 224 S.E.2d 3 (1976); and *Fleming v. State*, 236 Ga. 434, 435, 224 S.E.2d 15 (1976). His conviction for armed robbery must be affirmed.

4. Defendant contends in enumerations of error 8 and 9 that the trial court erred in denying his motion for funds for a private investigator and for an examination by a private psychiatrist.

[4-6] The grant or denial of a motion for independent psychiatric evaluation lies within the discretion of the trial court and will not be overturned unless an abuse of discretion is shown. *Messer v. State*, 247 Ga. 316(1), 276 S.E.2d 15 (1981). Likewise, the grant or denial of a motion for funds to employ an investigator lies within the sound discretion of the trial judge and will not be overturned unless an abuse of discretion is shown. See *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980). The case against the defendant was factually simple and did not depend on a large volume of evidence of a technical nature. We find no abuse of discretion in the trial court's denial of the motion for funds to hire an investigator.

[7] The defendant was examined twice at Central State Hospital and found to be mentally competent both times. No plea of insanity was filed, and under the circumstances of this case we find no abuse of discretion in overruling the motion for a private psychiatric examination.

5. Defendant contends in enumeration of error 10 that the trial court erred in overruling his motion to suppress the several statements he gave to police officers. He gave four statements to officers, and each time prior to making the statement he was advised of his rights and signed a written waiver. The first and second statements are identical, one given to the North Carolina authorities at the time of his arrest, and one to the Georgia authorities. On the return trip to Georgia, the defendant spontaneously amended his statement, telling where he had disposed of the murder weapon and the clothes he was wearing on the night of the murder. Later, the defendant requested officers to come see him. He then gave a fourth statement implicating his wife in that she planned the robbery and took the money from the bedroom while he beat the victim with a wrench.

"In the course of the trial, the court conducted a Jackson-Denno hearing in which the court concluded that his confession was freely and voluntarily given. There being ample evidence presented in the trial court to support its determination, it will not be disturbed on appeal." *Gunn v. State*, 244 Ga. 51, 257 S.E.2d 538 (1979).

[8, 9] On January 2, 1979, the defendant gave North Carolina authorities a complete confession after he was advised of his rights and he signed a written waiver. Sometime thereafter an attorney was appointed for extradition purposes. Georgia authorities arrived in North Carolina, questioned him on January 3, 1979, and obtained an identical statement after a written waiver. The first statement was introduced in evidence against him as was the second. After he was returned to Georgia, local counsel was appointed. Thereafter, on the 12th of January, he got in touch with detectives, requested they come to see him, and gave a full statement which was also introduced in evidence against him. He now complains that the second and fourth statements were made without benefit of counsel and should be excluded. We do not agree. The last statement was made upon his own request, and therefore was properly admitted. *Edwards v. Arizona*, — U.S. —, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The second statement taken by Georgia authorities in North Carolina was identical to the first statement. Because the first statement was properly introduced against the defendant, no material prejudice has been demonstrated. There is no merit in this enumeration of error.

[10] 6. Defendant argues in enumeration of error 11 that the trial court erred in denying his Brady motion seeking copies of his statements given to the investigating officers. He argues that the statements contained exculpatory matters as to the murder charge.

This same argument was made in *Baker v. State*, 245 Ga. 657(3), 266 S.E.2d 477 (1980), and this court held: "Brady applies to 'the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.' *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)." Here defendant's own statements were the subject of the Brady motion. Thus, this was not information unknown to the defense and subject to discovery under Brady. Furthermore, the evidence his motion sought was introduced to the jury in entirety, and a favorable inference, if any, could be drawn by the jury. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980). There is no merit in this enumeration of error.

7. In the twelfth enumeration of error the defendant contends the trial court erred in allowing the two G.B.I. agents assigned to investigate the case to remain in the courtroom to assist in the prosecution over his objection. His argument is that the district attorney did not present sufficient facts to the court for it to exercise its discretion in allowing the two agents to remain and not to require the prosecution

to call them as its first witnesses. Pretermitting waiver, we find no merit in defendant's argument.

In his request to the court to allow the witnesses to remain in the courtroom, the district attorney stated that he would put the witnesses up "as quickly as I can."

Only one of the agents was called to testify although the other was sworn and offered to the defense for cross-examination. The agent who testified did not testify on the same subjects as previous witnesses.

[11, 12] It has been held many times that it is within the trial court's discretion to allow the prosecuting officer to remain in the courtroom as an exception to the sequestration rule. *Hall v. State*, 243 Ga. 207(6), 253 S.E.2d 160 (1979). The orderly presentation of evidence is a proper reason for an exception to the rule of sequestration. *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1975). There is no merit in this enumeration of error. See generally *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981).

[13] 8. Defendant contends in enumeration of error 13 that the overruling of his motion for change of venue was error.

The motion was based on three news reports and the "small town syndrome" argument that everybody in town knew everything that was going on. The three news reports told of the murder, the arrest of the defendant the following day, and his indictment three weeks later. The articles were factual in nature and the defendant has failed to show a "pattern of deep and bitter prejudice" created by pre-trial publicity was "present throughout the community" and was reflected in the verdict reached by the jurors who tried him. *Irvin v. Dowd*, 366 U.S. 717, 727, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1960). See *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979). The defendant was not tried until some ten months later, and no evidence was presented as to any prejudice towards the defendant on voir dire or otherwise. No prospective juror was excused for prejudice. *Messer v. State*, supra. The motion is completely lacking in merit and the trial court did not err in overruling it.

Enumerations of error 5, 7, 14 and 15, challenging the constitutionality of the death penalty and the finding of the (b)(7) aggravating circumstances will be dealt with in the sentence review.

SENTENCE REVIEW

As required by Georgia Law (1973), p. 159, et seq., (Code Ann. § 27-2537(c)(1-3)), we have reviewed the death sentences in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. We conclude that the sentences of death in this case were not imposed under the influence of passion, prejudice, or any arbitrary factor.

[14] 9. The jury found the following aggravating circumstances: (a) the offenses of murder and armed robbery were committed while the offender was engaged in the commission of another capital felony or aggravated battery. Code Ann. § 27-2534.1(b)(2); and, (b) the offenses of murder and armed robbery were outrageously or wantonly vile, horrible, inhuman, in that they involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

The evidence supports the finding of both aggravating circumstances by a rational trier of fact beyond reasonable doubt. *Jackson v. Virginia*, supra. *Cervi v. State*, — Ga. —, 282 S.E.2d 629 (1981).

In that the sentences of death in this case rest partially upon a finding of Code Ann. § 27-2534.1(b)(7), they must be reviewed in light of the United States Supreme Court's decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, supra, as construed by this court in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980). "Torture," as the term is used in the statute, occurs when the victim is subjected to serious physical abuse prior to death. *Hance v.*

State, supra. The victim in this case was not killed instantaneously, but was beaten with a large wrench. Forensic medical evidence established that both of the victim's forearms were broken, the victim's lip was bruised, his nose was split, and his cheekbone was fractured. The victim suffered blows to the head which resulted in eight skull fractures. By the defendant's own statement, when he left, the victim was lying on the floor moaning. "Torture" also occurs when a victim is subject to an aggravated battery prior to death. The jury was authorized to find from the evidence an aggravated battery prior to death in that the victim's arms were, at a minimum, rendered useless. *Hance v. State*, supra; *Baker v. State*, supra. A defendant who "tortures" his victim may be found to have a depraved mind. *Hance v. State*, supra. This was not a domestic murder, the victim gave the defendant no reason whatsoever to assault him, and was in no manner threatening. Rather, he had befriended the defendant and given him and his family food on prior occasions. The defendant and his wife fled and attempted in every manner to hide the crime. See *Godfrey v. Georgia*, supra. The sole motive for the murder was to rob the victim. The murder was outrageously or wantonly vile, horrible and inhuman, and this murder is distinguished from ordinary murders in which the death penalty is not appropriate. *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Cervi v. State*, supra. Under the facts of this case, this court finds that the murder was of the type universally condemned by civilized society as wantonly vile, horrible, and inhuman as it involved torture to the victim as set forth above.

[15] 10. The appellant argues that since the jury found the aggravating circumstances set forth in division 9 above in the words of the statute, that is, a finding connected by the conjunction "or", this in itself indicates that the jury did not make up their minds that the aggravating circumstance existed beyond a reasonable doubt. However, the jury's returning the aggravating circumstance in the language of the code section is sufficient when the evidence supports such a finding. See *Hance v. State*, supra.

[16] 11. Appellant contends that the trial court erred in failing to charge the definition of aggravated battery as that the term is used in both Code Ann. § 27-2534.1(b)(2) and § 27-2534.1(b)(7). However, in this case the evidence supported a finding by a rational trier of fact beyond a reasonable doubt that the murder and armed robbery of the victim were committed while in the commission of an aggravated battery, and furthermore that the murder and armed robbery were outrageously or wantonly vile, horrible or inhuman, and that they involved an aggravated battery to the victim. Therefore, in this case, absent a request to charge, it was not reversible error for the trial court to fail to charge the definition of an aggravated battery. Code Ann. § 26-1305. *Cape v. State*, supra; see *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981).

12. The trial court did not err in failing to charge the meaning of Code Ann. § 27-2534.1(b)(7). *Hance v. State*, supra; *Cape v. State*, supra; *Gilreath v. State*, supra.

[17] 13. We find defendant's arguments that the Georgia death penalty statute is vague because it fails to set out that the jury may recommend a life sentence even though they find the existence of an aggravating circumstance and, furthermore, that the statute is unconstitutional because under our system there is no provision for a life sentence without parole, to be without merit. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978); see *Tucker v. State*, 244 Ga. 721(11), 261 S.E.2d 635 (1979).

[18] 14. The trial court's written charge to the jury during the sentencing phase of the trial was not subject to the defects dealt with in *Fleming v. State*, supra, and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978). However, the trial court, in its oral charge to the jury, did not give the entire written charge that was ultimately sent out with the jury as required

by the statute. While we do not approve of this practice, the charge as a whole met the test set forth in *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288 (1978).

In reviewing the death penalty in this case we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty.

This was a brutal killing of an armed-robbery victim for the sole purpose of financial gain. The 22 cases in which the death penalty was imposed support the death penalty in the instant case. All of these cases involve the deliberate, unprovoked killing of an unarmed robbery victim or victims, and thus show a jury's willingness to impose a death sentence under these circumstances.

Defendant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. However, his sentence to death for armed robbery must be set aside and he must be resentenced as to that offense. *Floyd v. State*, 233 Ga. 280, 285, 210 S.E.2d 810 (1974); *Gregg v. State*, 233 Ga. 117, 126(6), 210 S.E.2d 659 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Judgment affirmed in part and reversed in part.

All the Justices concur, except HILL, P. J., dissents to Divisions 1 and 14.

WELTNER, J., not participating.

APPENDIX

Cervi v. State, — Ga. —, 282 S.E.2d 629 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1980); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979); *Baker v. State*, 243 Ga. 710, 257 S.E.2d 192 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Dobbs v. State*, 236 Ga. 427, 234 S.E.2d 8 (1976); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Hunter v. State*, 231 Ga. 494, 202 S.E.2d 441 (1973); *Kramer v. State*, 230 Ga. 855, 199 S.E.2d 805 (1973); *Lingo v. State*, 226 Ga. 496, 175 S.E.2d 657 (1970).

DUNHAM

v.

BELINKY.

No. 37594.

Supreme Court of Georgia.

Nov. 13, 1981.

The Fulton Superior Court, Charles L. Weltner, J., entered judgment in divorce proceeding, and appeal was taken. The Supreme Court, Marshall, J., held that a trial court may in exercise of its discretion allow a spouse who incurs expenses in employing a private investigator in order to uncover evidence of adultery committed by the other spouse to recover those expenses as part of the alimony award.

Reversed and remanded with direction.

Clarke and Smith, JJ., dissented.

RECEIVED
FEB 1 1982
CLERK
SUPREME COURT

81 6151

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, James Cunningham, Jr., by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Cunningham's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

No.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am an attorney for James Cunningham, Jr., the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Cunningham's motion for leave to proceed in forma pauperis. My representation of Mr. Cunningham is without remuneration.

2. Mr. Cunningham is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Cunningham by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Cunningham is attached hereto.

3. Counsel was appointed to represent Mr. Cunningham at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Cunningham is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Cunningham is entitled to redress in this action.

JOHN CHARLES BOGER

Sworn to before me this
29th day of January, 1982.

GLORIA A. JONES
Notary Public, State of New York
No. 24-7113000
Qualified in Kings County
Commission Expires March 30, 1982

NOTARY PUBLIC

No. 81-6151

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES CUNNINGHAM, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

I, James Cunningham, Jr., being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Lincoln County, a trial court of the State of Georgia, of murder and armed robbery, and was sentenced to death. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course

of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

James Cunningham, Jr.
JAMES CUNNINGHAM, JR.

STATE OF GEORGIA
COUNTY OF BUTTS

The foregoing affidavit of James Cunningham, Jr., was subscribed and sworn to before me this 11 day of February, 1982.

Aaron Nogueira
NOTARY PUBLIC
My Commission Expires
9-20-83

RECEIVED
MAR 3 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-6151

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, TERM, 1981

JAMES CUNNINGHAM, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GEORGE M. WEAVER
Staff Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General

MARION O. GORDON
Senior Assistant Attorney General

JOHN. C. WALDEN
Senior Assistant Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

1. Has petitioner, who under Georgia law waived any issue regarding the composition of the grand jury which indicted him, shown that he was actually prejudiced by its allegedly unconstitutional composition?

2. Has petitioner demonstrated that the traverse jury which convicted and sentenced him was unconstitutionally composed?

3. Did the trial court commit constitutional error in denying petitioner's motion for funds to hire a private investigator?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

A. PROCEEDINGS IN THE COURTS BELOW 2

B. STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

A. COMPOSITION OF GRAND JURY 6

B. COMPOSITION OF TRAVERSE JURY 7

C. MOTION FOR FUNDS TO HIRE A PRIVATE INVESTIGATOR 10

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

A. CASES — PAGE

Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) 8, 9

Casteneda v. Parida, 430 U.S. 482 (1977) 9

Coleman v. Alabama, 377 U.S. 129 (1964) 6

Cunningham v. State, ___Ga.___, 284 S.E.2d 390 (Nov. 13, 1981) 2, 6, 10

Duren v. Missouri, 439 U.S. 357 (1979) 5, 7, 9, 10

Francis v. Henderson, 429 U.S. 536 (1976) 7

Godfrey v. State, 243 Ga. 302 (1979), rev'd in part on other grnds, 446 U.S. 420 (1980) 6

Hoback v. Alabama, 607 F.2d 680 (5th Cir. 1979) 10, 11

Mason v. Arizona, 504 F.2d. 1345 (9th Cir. 1974) 11

Sanders v. State, 235 Ga. 425 (1975) 6

Sullivan v. State, 246 Ga. 426 (1980) 6

Swain v. Alabama, 380 U.S. 202 (1965) 7

Taylor v. Louisiana, 459 U.S. 522 (1975) 7

Turner v. Fouche, 396 U.S. 346 (1969) 8

United States v. Apodaca, 666 F.2d 89, (5th Cir. 1981) 9

Westbrook v. State, 242 Ga. 151 (1978), cert. denied, 439 U.S. 1102 11

Whitaker v. State, 246 Ga. 163 (1980) 11

B. STATUTES — PAGE

Ga. Code Ann. § 59-201 8

Ga. Code Ann. § 59-701 8

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

During the January, 1979 term of the Superior Court of Lincoln County, Georgia, petitioner, James Cunningham, Jr., was indicted in three counts for burglarizing the home of William B. "Foots" Crawford, committing an armed robbery against Mr. Crawford, and for murdering Mr. Crawford. The indictment alleged that petitioner committed these offenses on January 1, 1979. (R.3-4). Petitioner was tried on this indictment before a jury in the Lincoln County Superior Court on October 23-25, 1979. At the close of the evidence, the State entered a nolle prosequi to the burglary charge. (T. 317; R.4). After deliberating less than an hour the jury returned guilty verdicts against petitioner on both the armed robbery and murder counts. (T. 365; R.4). After hearing additional evidence regarding sentence, the jury fixed petitioner's punishment at death. (T. 432). The Georgia Supreme Court affirmed petitioner's convictions and sentences on appeal. Cunningham v. State, ___ Ga. ___, 284 S.E.2d 390 (Nov. 13, 1981). The court denied a rehearing on December 1, 1981.

B. STATEMENT OF FACTS

The State's evidence showed that petitioner planned and carried out the armed robbery and murder of William Crawford. Petitioner and his wife, Emma Cunningham, planned to rob the victim before going to the latter's house. (T. 263-64). To aid in their criminal plans, petitioner and his wife took along a wrench. (T. 226, 263-64, 285). Petitioner and his wife were seen in the neighborhood of the victim's house around the time

of the crimes, 6:00-9:00 p.m., January 1, 1979. (T. 123-24, 175-77, 182-84). The victim, who apparently operated a store in his home, knew petitioner and his wife and let them into his house. (T. 126-27, 211-12, 226, 257). Petitioner asked for some Winston cigarettes and when the victim bent down to get them, petitioner hit him with the wrench. When this blow failed to subdue the victim, petitioner bludgeoned him repeatedly with the wrench. (T. 226, 257-58). According to Dr. Larry Howard of the State Crime Laboratory, the victim was struck at least 18 times. Some of the blows broke both of the victim's arms as he tried to defend himself by covering his head with his arms, one blow shattered his eyeglasses, and at least eight of the blows to his head were capable of causing death. (T.148-53, 281). The victim's body, arms, and especially head were "completely covered with blood." (T. 131). His horrible wounds are graphically depicted in State's Exhibits 1-4 and 17-22.

After brutally beating the victim, who, according to petitioner, was still alive (T. 258, 285, 391), petitioner and his wife went into the victim's bedroom and took his pocketbook from under the bed where they knew he kept his money. (T. 212, 226, 258). Petitioner and his wife then fled the scene. Petitioner threw his bloody wrench into a field (T. 212, 258) and his gory clothes and the victim's now-empty pocketbook down an abandoned well. (T. 261, 275). With some of the $330 they found in the victim's pocketbook, petitioner and his wife that same night paid a friend to take them to Augusta, Georgia and there purchased one-way bus tickets to Newark, New Jersey. (T. 192-93, 197-98). The friend who had taken the Cunninghams to Augusta became suspicious when he learned of the murder of Mr. Crawford; he then informed the local sheriff. (T. 193-94). The sheriff contacted the Durham, North Caroline Police

Department and asked that petitioner be detained when the bus he was on stopped there. Detective R. P. Franklin of the Durham Police Department took petitioner into custody at the bus station in Durham at about 11:00 a.m., January 2, 1979. (T. 200-202).

Petitioner made a written confession to Detective Franklin, and later two oral confessions to Georgia Bureau of Investigation Agents Mike Seigler and Jim Carver. All of these confessions were admitted into evidence. (T. 225-28, 269-77, 283-86). Petitioner also led the GBI Agents to the wrench and the abandoned well where he had disposed of his clothes and the victim's pocketbook. (T. 275-80).

Petitioner did not testify and offered no evidence in the guilty phase of his trial. (T. 307-8, 312-13). In the sentencing phase of his trial, petitioner himself testified and offered evidence of his character before the murder. (T. 375-83).

SUMMARY OF ARGUMENT

By failing to challenge the array of the grand jury before indictment, petitioner waived any issue as to the constitutionality of its composition. With regard to the traverse jury, petitioner failed to support his challenge with a prima facie case. Specifically, he failed to show that the representation of women and blacks on the traverse jury list was "not fair and reasonable in relation to the number of such persons in the community." Duren v. Missouri, 439 U.S. 357, 364 (1979). Also, he failed to show that the under-representation was due to the "systematic exclusion of the group[s] in the jury-selection process." Id. Thus his challenge to the array of the traverse jury was properly denied. Finally, petitioner's motion for funds to hire a private investigator was properly denied because petitioner has failed to show that he was in any way harmed or prejudiced by the denial.

ARGUMENT

A. COMPOSITION OF GRAND JURY

Petitioner attacks the composition of the grand jury that indicted him. He contends that blacks and women were unconstitutionally underrepresented on the jury list from the grand jury was drawn.

However, petitioner waived this issue by failing to raise it before indictment. Under Georgia law, a challenge to the array of a grand jury must be made before indictment unless the defendant is able to show that at the time of indictment he had neither actual nor constructive knowledge of the composition of the grand jury. Otherwise, a defendant waives the issue. Sullivan v. State, 246 Ga. 426, 427 (1980); Godfrey v. State, 243 Ga. 302, 305 (1979), rev'd in part on other grnds, 446 U.S. 420 (1980); Sanders v. State, 235 Ga. 425, 426 (1975). Petitioner was indicted on January 22, 1979, but did not challenge the composition of the grand jury until October 22, 1979, one day before his trial.

Unlike petitioner's contention, the Georgia Supreme Court did not excuse this procedural default by reaching the merits of his complaint. Rather, that court clearly based its decision on this issue on petitioner's waiver. The Georgia court went on to hold that with regard to petitioner's challenge to the array of the traverse jury, he had failed to establish a prima facie case. Cunningham, supra, at 392-93. cf. Coleman v. Alabama, 377 U.S. 129 (1964) (despite procedural default, the lower court's judgment "'rested'" upon its decision on the merits).

Unless one who has waived his challenge to the composition of a jury can show that he has suffered actual prejudice, he is not entitled to federal relief. Francis v. Henderson, 429 U.S. 536 (1976). Petitioner has not suggested that he was actually prejudiced by the composition of the grand jury.

For these reasons, then, the Court should not grant certiorari on this issue.

B. COMPOSITION OF TRAVERSE JURY

Petitioner also claims that the traverse jury that convicted and sentenced him to death was drawn from an unconstitutionally composed jury list. Petitioner contends that the traverse jury list was composed in violation of both the Sixth and Fourteenth Amendments.

In order to prevail on a Sixth Amendment challenge to the composition of a jury list, one must establish a prima facie case consisting of three elements. In the Court's words:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364(1979).

The first element of a prima facie case was met by petitioner's challenge. Women and blacks are, of course, distinctive community groups within the meaning of Duren. Swain v. Alabama, 380 U.S. 202 (1965); Taylor v. Louisiana, 459 U.S. 522 (1975).

Petitioner failed, however, to establish the second part of a prima facie case. Two points should be made in this regard. First, petitioner has exaggerated the under-representation of blacks and women on the Lincoln County traverse jury list. Assuming the accuracy of petitioner's figures, the absolute disparity between the general population and the jury list was 16.83% for women and 15.52% for blacks. He has calculated the under-representation by the "comparative disparity standard" at 35.82% for blacks and 33.09% for women. (Pet. Br. at 9). Yet in his citation of other cases decided by this Court, petitioner mentions only the absolute percentile disparities. E.g., 23%, Turner v. Fouche, 396 U.S. 346, 359 (1969); and 33%, Carter v. Jury Commission of Greene County, 396 U.S. 320, 327-28 (1970). Petitioner misleadingly compares the under-representation by the comparative method in the instant case with the absolute disparity in the cases he cites. Moreover, petitioner is careful not to mention that the absolute disparity in Casteneda v. Partida, 430 U.S. 482, 495 (1977), which he cites repeatedly for other points, was 40% -- far greater than the percentages found in the instant case. Clearly, the under-representation of blacks and women in the instant case is not nearly so great as in the typical case in which a prima facie showing has been made. Second, petitioner has failed to establish the second part of a prima facie case because he has not shown the percentages of women and blacks in the general population of Lincoln County which are eligible for jury service. He has not shown what percentages are of voting age, without a conviction for a crime involving moral turpitude, and meet the other qualifications for jury service. Ga. Code Ann. §§ 59-201, 701. For these reasons, petitioner has failed to show that the representation of women and blacks "in venires from which juries

are selected is not fair and reasonable in relation to the number of such persons in the community." Duren, supra, at 364. See United States v. Apodaca, 666 F.2d 89, 93 (5th Cir. 1982) (prima facie case not shown because percentages eligible for jury service not established).

Finally, petitioner has also failed to establish the third part of a prima facie case--that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren, supra, at 364. In other cases in which the Court found prima facie cases of unconstitutional jury composition, statistics have been presented showing underrepresentation over extended periods of time. Carter, supra at 327-28 (blacks under-represented 1961-67); Castaneda, supra, at 495-96 (Mexican-Americans under-represented over 11 year period). Yet, in the instant case, petitioner has shown underrepresentation on only one Lincoln County jury list. This clearly falls short of the required showing of "systematic exclusion." Furthermore, unlike in many other cases in which the Court has recognized prima facie cases, the jury selection procedure employed in the instant case was entirely objective and facially non-discriminatory. The traverse jury list was chosen, as was required under a federal district court order, by the random selection of every fifth name on the registered voters' list. It is instructive to compare the "highly subjective" method employed in Castaneda, supra, at 497, which the Court found to support the prima facie case. The Court said, "[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." Id., at 494.

To the extent that petitioner states an equal protection claim, it is successfully rebutted by evidence of good faith efforts to compose a jury list made up of a fair cross-section of the eligible population and evidence of the absence of any discriminatory purpose. The Court has held that such rebuttal evidence is significant for refuting an equal protection challenge to the composition of a jury. Duren, supra, at 368, n.26, and cases cited therein. The stipulation at trial that the federal district court order was faithfully followed clearly demonstrates good faith and the absence of discriminatory purposes.

For all of these reasons, the Court should deny certiorari on this issue.

C. MOTION FOR FUNDS TO HIRE A PRIVATE INVESTIGATOR

Petitioner also contends that his motion for funds to hire a private investigator was denied in violation of his Sixth and Fourteenth Amendment rights. He admits that the Georgia Supreme Court correctly described the case against him as "factually simple" and non-technical. Cunningham, supra, at 393. (Pet. Br. at 13-14). Yet, petitioner claims that the provision of state monies may have led in unforseeable ways to the development of defense evidence. Petitioner's real position is, then, that state monies should be provided to all indigents for investigation. This is true because in all cases further investigation might lead to evidence helpful to the defense.

But, there is no general requirement that funds for investigation be provided to indigents. In Hoback v. Alabama, 607 F.2d 680 (5th Cir. 1979), for example, the Fifth Circuit held that, although a case probably would arise in which the

State was constitutionally required to provide expert assistance to a defendant, the appellant had not shown that his constitutional rights were denied. The court reasoned that even if a fingerprint expert had testified in the manner suggested by appellant the outcome of the trial would have been the same. Id., at 682-83. In Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), the Ninth Circuit held that investigative assistance to an indigent defendant "is not automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case." Id., at 1352. The court went on to hold that in order to show that the denial of investigative assistance has violated his due process or equal protection rights. an indigent must show by clear and convincing evidence that he has been substantially prejudiced. Georgia law is not inconsistent: The provision to an indigent of funds for investigative help or expert assistance is a matter of discretion for which a court will not be reversed absent abuse. Whitaker v. State, 246 Ga. 163 (1980); Westbrook v. State, 242 Ga. 151, 153 (1978), cert. denied, 439 U.S. 1102.

Petitioner has not shown that he was harmed in any manner by the denial of his motion for funds. The best he can do is speculate that evidence, primarily impeaching, might have been developed. He has thus failed to show that the outcome of his trial would have been affected, that he was substantially prejudiced, or that the trial court abused its discretion.

For these reasons the petition for certiorari should not be granted on this issue.

CONCLUSION

The instant petition should not be granted because the Supreme Court of Georgia has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

GEORGE M. WEAVER
Staff Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General

Please serve:

GEORGE M. WEAVER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344